October 2019

Administrative Appeal Brief - FUSL000030

[redacted]

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION

BOARD OF PAROLE

APPEALS UNIT

ADMINISTRATIVE APPEAL BRIEF

APPEAL No.

[redacted]

APPELLANT
FISHKILL CORRECTIONAL FACILITY
P.O. BOX 1245
BEACON, NEW YORK 12582

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION - BOARD OF PAROLE

IN THE MATTER OF	:	
[redacted]	:	
DIN No. [redacted]	:	**ADMINISTRATIVE**
NYSID No. [redacted]	:	**APPEAL BRIEF**
	:	

STATEMENT OF FACTS

Appellant [redacted] ("appellant and/or [redacted]") appeals from a determination issued by the New York State Department of Corrections and Community Supervision (DOCCS) - Board of Parole (Board), dated November 10, 2015, denying his eleventh application for release consideration, and holding him for an additional twenty-four (24) months.[1] *See*, Exhibit - "A", Parole Board Hearing Transcript ("HT"), dated November 10, 2015, at Pp. 31-32.

[redacted] commitment to (DOCCS) stems from a verdict finding him guilty, in the Supreme Court of the State of New York, Madison County, of the crimes of Murder in the Second Degree (2 counts); Criminal Possession of a Weapon in the Second Degree (2 counts); and Robbery in the first degree. Additionally, [redacted] entered a plea of guilty in

[1] The first ten appearances resulted in a 24 month hold.

that same court to the crime of Conspiracy in the Second Degree.

[redacted] was subsequently sentenced to concurrent terms of twenty-five years to life for all charges with the exception of the Robbery in the First degree, which was to run consecutive to all other charges. Since the merging of the statutes were different in 1975, when [redacted] was first committed to (DOCCS), the consecutive sentence merged into the concurrent ones - for an aggregated term of twenty-five years to life. [redacted] has now been incarcerated 42 years, that is, seventeen years over his minimum period of incarceration.

BACKGROUND

Records indicate that on October 24, 1974, [redacted], along with four accomplices robbed a jewelry store in Syracuse, New York and then departed the scene in two vehicles. One of which contained [redacted] and co-defendant [redacted]. While returning back to New York City, Mr. [redacted] and [redacted], being together in the car, were stopped by a state trooper. A scuffle ensued between Mr. [redacted] and the state trooper. During this scuffle, [redacted] fatally shot the trooper.

INTRODUCTION

[redacted], a union carpenter and ex-drug-abuser, has been incarcerated over four decades. He has participated in nearly every program (DOCCS) has to offer. Has become a member of an exclusive Poetry writing class which resulted in the publication of several short stories and received numerous writing awards. He has assumed positions of significant responsibility by tutoring illiterate men in courses such as Adult Basic Education, and eventually preparing them to take their GED. [redacted] has accepted full responsibility for his past actions, has expressed deep remorse for the result of his conduct, and has been placed at the lowest possible level for future risk by the COMPAS.

Despite these achievements, [redacted], a seventy-three year old Grandfather, remains in prison for one reason - and one reason alone: his crime committed over four decades ago, when he was thirty-one.

The murder of State Trooper, [redacted], has caused [redacted] to look at life through a different pair of lenses, expressing profound sorrow and remorse. His last ten parole denials focused exclusively on his instant offenses and on little else.

I. Parole Hearing

At [redacted] November 10, 2015, reappearance hearing, he was denied release for the following reasons:

Parole Decision:

DENIED - 24 MONTHS, NOVEMBER 2017.

After a review of the record, interview, consideration of all statutorily required factors and deliberation, this panel has determined that if released at this time there is a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law.

This decision is based on the following factors:

Your instant offenses are Murder 2nd degree two counts, Robbery 1st degree, Criminal Possession of a Weapon 2nd degree three counts, and Conspiracy 2nd degree in which you acted in concert with others and robbed a jewelry store in Syracuse. During your return to New York City, you were stopped by a New York State Trooper. You shot him causing his death. You stole a car and fled and you committed these offenses while under parole supervision.

Your record dates back to a 1957 JD, includes several felonies, a juvenile history, prior violence, prior prison, and failure at prior community supervision.

Due consideration was given your sentencing minutes, COMMPAS Risk Assessment, rehabilitative efforts, case plan, risks, needs, parole plan, letters of support, age, medical status, disciplinary record, significant opposition to your release, remorse, insight, as well as all other factors required by law.

> Your violence and senseless actions were a horrific escalation of your criminal lifestyle, needlessly causing the death of a brave [redacted] State Trooper, [redacted], and forever harming his family. Your version of events indicate you initiating the gun battle.
>
> The instant offense is an escalation of your violent criminal history.
>
> You clearly failed to benefit from prior efforts at leniency and rehabilitation.
>
> Parole is denied.

See, ("HT") at Pp. 30-31.

[redacted] appeals the aforementioned decision on the grounds that **a)** the Board focused exclusively on the instant offense and a juvenile delinquent adjudication rendered 58 years ago; **b)** relied upon erroneous information; **c)** relied on significant opposition; **d)** failed to consider the most recent case plan; and **e)** rendered a detailed decision in conclusory terms.

QUESTIONS PRESENTED

1). WHETHER THE DETERMINATION OF THE BOARD WAS ARBITRARY AND CAPRICIOUS AND IRRATIONAL BORDERING ON IMPROPRIETY, WHEN IT FOCUSED EXCLUSIVELY ON THE INSTANT OFFENSE AND A JUVENILE DELINQUENT ADJUDICATION RENDERED 58 YEARS AGO? NY EXECUTIVE LAW §259-i[2][a]; 9 NYCRR § 8006.3(a)(1).

2). WHETHER THE DETERMINATION OF THE BOARD WAS ARBITRARY AND CAPRICIOUS AND IRRATIONAL BORDERING ON IMPROPRIETY, WHEN IT RELIED UPON ERRONEOUS INFORMATION? NY EXECUTIVE LAW §259-i[1][a][ii]; 9 NYCRR §§8002.1[a][b]; 8002.3[a][c]; 8006.3[a][1].

3). WHETHER THE DETERMINATION OF THE BOARD WAS ARBITRARY AND CAPRICIOUS AND IRRATIONAL BORDERING ON IMPROPRIETY, WHEN IT RELIED ON SIGNIFICANT OPPOSITION TO DENY RELEASE? NY EXECUTIVE LAW § 259-i(2)(c)(A)(vii)(viii); 9 NYCRR § 8002.3(a),(3),(5),(8).

4). WHETHER THE DETERMINATION OF THE BOARD WAS ARBITRARY AND CAPRICIOUS AND IRRATIONAL BORDERING ON IMPROPRIETY, WHEN IT FAILED TO CONSIDER THE MOST RECENT CASE PLAN, TRANSITIONAL ACCOUNTABILITY PLAN (TAP)? NY EXECUTIVE LAW §§ 259-c[4], 259-c[12]; NY CORRECTION LAW §71[A]; 9 NYCRR § 8002.3(12); (DOCCS) DIRECTIVE 8500.

5). WHETHER THE DETERMINATION OF THE BOARD WAS ARBITRARY AND CAPRICIOUS AND IRRATIONAL BORDERING ON IMPROPRIETY, WHEN IT RENDERED A DETAILED DECISION IN CONCLUSORY TERMS? NY EXECUTIVE LAW §§ 259-i[2][a][ii];[2][c][A][i]; 9 NYCRR § 8002.3(d).

POINT I

THE BOARD FOCUSED EXCLUSIVELY ON THE INSTANT OFFENSE AND A 58 YEAR OLD JUVENILE DELINQUENT ADJUCATION TO DENY RELEASE.

It has been well settled that, where the Parole Board denies release solely on the basis of the seriousness of the offense and in the absence of any aggravating circumstances, it acts irrationally. *Matter of Mitchell*, 58 AD3d at 743; *Matter of Friedgood v. NYS Bd. of Parole*, 22 AD3d 950, 951; *cf. Matter of Guzman v. Dennison*, 32 AD3d 798, 799.

Here, [redacted] respectfully submits, the Board denied him parole based on the instant offense and a juvenile delinquent adjudication that was rendered 58 years ago, without stating or showing "some aggravating [or egregious] circumstances beyond the inherent seriousness of the crime itself." *Matter of King v. NYS Div. of Parole*, 190 AD2d 423, 433, *aff'd*, 83 NY2d 788; *see, also, Ramirez v. Evans*, 118 AD3d 707 (A.D. 2 Dept. 2014)(held that the Board denied release solely on the basis of the seriousness of the offense). *See*, ("HT") at 31 ("Your record dates back to a 1957 JD . . .").

Here, while [redacted] actions in shooting a state trooper were senseless, selfish and inexcusable, under "no

rational theory will the nature of [his] crime become less [serious]" between parole board appearances [*see, Flynn v. Travis*, No. 19168-98 Slip Opinion], but the "instant offense" without more does not constitute "aggravating or egregious circumstances." *Malone v. Evans*, Orange County Sup. Ct., Index No. 13459/2009, March 16, 2010, Justice Victor Alfier ("the serious nature of the instant offense . . . does not constitute aggravating factors"), *aff'd*, at 83 AD3d 719 (A.D. 2 Dept. 2011); *Johnson v. NYS Div. of Parole*, 65 AD3d 838 ("the mere reference to the . . . crime without elaboration, does not constitute a requisite aggravating circumstance beyond the inherent seriousness of the crime").

Some cases where the Board failed to find any aggravating circumstances are found in the *Matter of Coaxum v. NYS Bd. of Parole*, 14 Misc.3d 661 and *Matter of Rios v. NYS Div. of Parole*, 15 Misc.3d 1107(A). Coaxum had been incarcerated for 21 years for tying the hands and feet of an 80 year old victim, strangling her with a cloth around her neck, and then burglarizing the victims residence. Though Coaxum's institutional record was exemplary, as were psychological insights, responsibility, guilt, shame and remorse, the Board denied her parole four times essentially citing:

> "You've programmed well, have an excellent disciplinary record and have much community support. However, your criminal act was extremely brutal and this panel feels that even though you've spent significant time in prison and have other significant positive factors mentioned above, we feel that your criminal act was so heinous that to release you at this time would deprecate the seriousness of it and undermine respect for the law."

The *Coaxum* court granted the petition holding that while parole is not to be granted merely as a reward for positive conduct and rehabilitative achievements, these factors must be considered. The court found that the Board's decision "accorded no weight and no emphasis whatsoever to any factor apart from the seriousness of petitioner's offenses." *Matter of Coaxum*, 14 Misc.3d at 666.

Rios, at the age of 19, pled guilty to two counts of murder in the second degree and was sentenced to two concurrent 18 years to life terms. Having been denied parole twice, the Supreme Court noted that "almost" all of the statutory factors the Board must consider weigh in Rios' favor. Consequently, the court expected a "rational explanation" why parole was denied. "Instead, the Parole Board focused almost entirely upon the nature of petitioner's crime" as its reasons to deny parole. *Matter of Rios*, 15 Misc.3d 1107(A).

Here, as with *Coaxum* and *Rios*, the Board based its decision solely on the instant offense and a juvenile delinquent adjudication that was rendered 58 years ago. They failed to find any aggravating circumstances beyond the inherent seriousness of the crime. Without any aggravating factors, the Board unjustifiably relied solely on the severity of the crime and has exceeded its administrative discretion and is contrary to law.

Similarly, here the Board failed to point to any aggravating egregious circumstances supporting their determination that "there is a reasonable probability [appellant] would not live and remain at liberty without again violating the law and [his] release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law." *See, e.g., Winchell v. Evans*, 32 Misc.3d 1217[A]("Its parole denial seems . . . to have been predetermined, based on their failure to articulate any basis why the Parole Board could not believe . . . if [appellant] is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law)." *Turner v. NYS Bd. of Parole*, 24

Misc.3d 1205[A](Board cannot rely on the crime alone to make a "reasonable probability" assessment that "if released at this time [appellant's] release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law)." *Matter of Michael Cassidy v. NYS Board of Parole*, Index No. Index No. 2255/2014 (Sup. Ct. Orange Co. May 27, 2015)("the 2015 denial failed to show the connection between the fact of crime and the risk of public welfare or respect for the law."); *Matter of Elizabeth Gonzalez v. NYS DOCCS*, Index No. 401130/2015 (Sup. Ct. NY Co. April 20, 2015)(held that by focusing exclusively on the nature of crime, the Board failed to comply with its statutory duty).

[redacted] avers, there were plenty of factors in favor of granting parole. First, he is currently 16 years over his minimum term of imprisonment; is 73 years of age; and suffered a stroke in December of 2014. In other words, appellant's health is rapidly deteriorating. *See*, ("HT" at Pp. 2,17,32); *see, also*, Exhibit - "B", Medical History Document, dated 12/22/2014.

Second, [redacted] has a good disciplinary record "for the length of time [he has] been in is not very long." *Id.* at 16. Third, appellant has a place of residence with his

"remarkable wife", [redacted] who currently works as "a property manager for a hotel out in [redacted] Hotel." ("HT") at Pp. 17-18. Additionally, appellant has family support from his daughter [redacted] and grandchildren, who live in [redacted] *Id.* at 19. He has also provided the Board with a letter of employment from the [redacted] - located in [redacted] *Id.* at 18. *See, also,* Exhibit - "E", Employment Letter from [redacted] by [redacted], dated October 27, 2015, respectively.

Third, and perhaps most importantly, [redacted] is considered the lowest risk for "future violence, rearrest, and absconding. So according to COMPAS, if [he's] released, COMPAS is indicating that [redacted] wouldn't hurt someone, wouldn't get rearrested, and wouldn't abscond. It's also indicating low in criminal involvement, low in history of violence." ("HT") at 20-21.

Additional factors in favor of granting parole is the fact that [redacted] has accepted full responsibility by focusing exclusively on his senseless, and selfish crimes. For instance, during the hearing, appellant, in expressing remorse states "I've lived a life where I have never forgotten what I've done and I've never felt bad towards the family who opposes me. I would wish that they would

understand that it's not easy to live with taking a man's life." *Id.* at 27.

[redacted] continues by stating "I destroyed so many lives on both sides of the fence. I don't know how I had so much destruction ability in me. It's a disgusting thing to be aware of for what you caused." *Id.* at 29.

Indeed, to deny a 73 year-old man parole for the eleventh time, although the crime was extremely serious, in the absence of any aggravating circumstances, then compounding that by relying on a juvenile delinquent adjudication rendered 58 years ago, for which he received and successfully completed a three year probation term, indicates that the decision by the Board was a foregone conclusion.

In fact, the conclusion by the Board ignores every single factor favoring [redacted] release, including the fact that [redacted], with the exception of the instant offense, has not been convicted of a crime for some 46 years. When adding to the equation [redacted] poor physical condition, it is very unlikely he will commit a crime if released.[2]

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[2] Notably, while [redacted] has previously been incarcerated for committing a Robbery with a toy pistol, he has never physically hurt anyone. In other words, his past was not a violent one.

Therefore, the Board's reliance upon the instant offense and a juvenile delinquent adjudication rendered 58 years ago, in the absence of any aggravating circumstances, was irrational. *See, e.g., Matter of West v. NYS Bd. of Parole*, Albany Co. Sup. Ct., Index No. 3069/2013, March 24, 2013, Justice Richard Mott ("The Board's clear focus was on petitioner's criminal record . . . and the subject conviction. The Board's intent to focus exclusively on these two factors is corroborated by its boilerplate decision . . .").

Indeed, the determination should be reversed and a *de novo* hearing conducted before a different panel of Commissioners.

POINT II

THE BOARD RELIED UPON ERRONEOUS INFORMATION.

It is well settled that, where erroneous information serves as a basis for a parole denial determination, such determination must be vacated and a new hearing ordered. *See, Smith v. NYS Bd. Of Parole*, 34 AD3d 1156 (A.D. 3 Dept. 2006); *Hughes v. NYS Div. of Parole*, 21 AD3d 1176 (A.D. 3 Dept. 2005); *Lewis v. Travis*, 9 AD3d 800 (A.D. 3 Dept. 2004); *Matter of Plevy v. Travis*, 17 AD3d 879 (A.D. 3 Dept. 2005).

In *Plevy*, the Appellate Division, Third Judicial Department, was constrained to reverse the determination of a Parole Board, when the Board based its determination on erroneous information. There, the Board improperly based its decision, in part, on a prior violation of probation which was dismissed. *Plevy*, 17 AD3d at 880.

Here, upon denying [redacted] application for parole consideration, the Board erroneously found that he was convicted of three counts of criminal possession of a weapon in the second degree, when he was only convicted of two counts. *See, e.g.*, Exhibit - "A", ("HT") at p.31; *see, also*, Exhibit -"C", Parole Board Report Sheet, dated October 20, 2015, indicating CPW (2 cts).

In *Smith v. NYS Bd. Of Parole, supra*, the petitioner's primary contention was that Respondent's relied upon erroneous information in denying his parole application. Specifically, that he had four felony convictions when, in fact, he only had three. In reversing the decision of the Supreme Court, the Third Judicial Department found that since "respondent relied upon erroneous information in denying parole release, [the] Court must annul respondent's determination and remit for a new hearing[.]" *Id.* at 1157.

Here, as in *Smith*, nothing in the record supports the Board's finding that he was convicted of three counts of

criminal possession of a weapon. Hence, the determination must be reversed and a *de novo* hearing conducted, before a different panel of Commissioners.

POINT III

THE BOARD'S RELIANCE ON SIGNIFICANT OPPOSITION TO DENY RELEASE WAS ERROR.

It is well settled that, when considering an inmate for release, the Board must consider, in relevant part:

> (iii) release plans including community resources, employment, education and training and support services available to the inmate.
>
> * * *
>
> (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement.
>
> (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement. The board shall provide toll free telephone access for crime victims. In the case of an oral statement made in accordance with subdivision one of section 440.50 of the criminal procedure law, the parole board member shall present a written report of the statement to the parole board. A crime victim's representative shall mean the crime victim's closest surviving relative, the committee or guardian of such person, or the legal representative of any such person. Such statement submitted by the victim or victim's representative may include information concerning threatening or intimidating conduct toward the victim, the victim's representative, or the

> victim's family, made by the person sentenced and occurring after the sentencing. Such information may include, but need not be limited to, the threatening or intimidating conduct of any other person who or which is directed by the person sentenced.

Executive Law § 259-i(2)(c)(A); *See, also,* NYCRR § 8002.3(a)(3),(5),(8).

Here, the Board considered "significant opposition to [redacted] release", not the least of which was generated by the powerful PBA, which was clearly outside the scope of the statute. For example, at the commencement of the hearing, [redacted] specifically informed Commissioner Ferguson about two opposition letters and one favorable letter he received in the mail prior to his appearance before the Board. In fact, the following exchanges occurred:

> **A.** I was going to ask you. I got two letters that came to me by mistake, I guess. They were addressed to this parole board in opposition to my release. One is from Missouri and one is from Alabama so I felt it right to give it to you.
>
> **Q.** Thank you for that.
>
> **A.** And I have one letter that came to me Friday night from a woman in support of my release.
>
> **Q.** You want to turn that in as well?
>
> **A.** I'd like to turn the three of them in, yeah.

See, ("HT") at p.2.

The legislature, in including the factors mentioned in Executive Law § 259-i, made its intent clear for the Board to consider whether or not the candidate has "resources" available to him or her upon release. By "resources" the legislature meant letters of support and/or letters of reasonable assurances of employment, housing, or treatment services, *not*, letters from Missouri or Alabama[3] from people who are not related to the victim.

Moreover, none of the factors listed above legislatively permit the Board to consider letters, petitions, etc. - written or in any other form - from any person(s) other than the victim or the victim's representative, i.e., the closest surviving relative, to weigh in on a parole decision. However, when the Board mentioned that they considered "significant opposition to [redacted] release", one would be hard pressed to think the Board failed to consider the letters from Missouri or Alabama.

Although Commissioner Ferguson did not mention the other sources of opposition (*see*, "HT" at Pp. 21-22), it can be plausibly argued that the Board employed its own penal philosophy in making its determination. This was

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[3] The letters from [redacted] were submitted by two members of law enforcement, copies which were verbatim from the State Police PBA website, as were many others improbably considered.

error. *See, e.g., McKenzie v. Stanford,* Index No. 2729/2015 (Sup. Ct. Dutchess Co., October 2, 2015); *Williams v. NYS Bd. of Parole,* (Sup. Ct. Lawrence Co., September 30, 2015).

Simply put, "community opposition" is not a statutory factor anywhere to be found in Executive Law § 259-i, or, in 9 NYCRR § 8002.3. As a result, the Board considered factors outside the scope of the applicable statute. *King v. NYS Bd. of Parole,* 83 NY2d 788, 791 (1994). While a Parole Board need not expressly discuss each of the factors in its determination, it must provide the parole applicant with a proper hearing in which only the relevant factors are considered. *Id.* at 790.

Furthermore, the Board also erred when it failed to consider, as required by statute, the "favorable letter" [redacted] received prior to his appearance. *See,* Executive Law § 259-i(2)(c)(B); *see, also,* ("HT") at p. 2; Indeed, the fact that the Board considered "significant opposition" on one hand, and failed to consider a "favorable letter" on the other, further supports [redacted] contentions that the Board employed its own penal philosophy in making its determination. *See, McKenzie v. Stanford, supra.*

Also of great significance, is the fact that the Board considered statements that were not an "official

statements" pursuant to Executive Law § 259-i(2)(c)(A).[4] This is particularly true considering that the statement was not submitted by the sentencing court. When [redacted] inquired about the statement, Commissioner Stanford stated that "[t]he statute is not specific." But contrary to Commissioner Stanford's statement, the statute is specific. In fact, the statute specifically states "recommendations of the sentencing court" *See*, ("HT") at Pp. 24-27. As a consequence, the Board considered a statement that was not an "official statement" as required by the Executive Law. As a result, the determination must be reversed and a *de novo* hearing conducted, before a different panel of Commissioners.

[4] The official statements considered were not these of the sentencing court, Honorable Ross A. Patane and the DA William F. O'Brien, to the prejudice of [redacted] hearing.

POINT IV

THE BOARD FAILED TO CONSIDER THE MOST RECENT CASE PLAN (TAP), CONSISTENT WITH THE 2011 AMENDMENTS.

I. The Amendments to Executive Law 259-c(4).

Effective October 1, 2011, New York State Legislators amended Executive Law 259 to incorporate a Risk and Needs Principal Assessment (COMPAS) in the parole decision making process. COMPAS was essentially statutorily enacted as Executive Law §259-c(4), to:

> "establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risks and needs principles to measure the rehabilitation of person appearing before the board, the likelihood of success of such persons upon release and assist members of the state board of parole in determining which inmates may be released to parole supervision."

II. Transitional Accountability Plan.

During the same legislative session in which Executive Law §259-c(4) was enacted, the Legislature also enacted Correction Law §71(a), requiring the development and use of a Transitional Accountability Plan (TAP), perhaps best described as a case management plan. Parole describes TAP as ". . . a coordinated case management plan which identifies the actions which need to take place in order to effectively prepare an individual for release to community

supervision . . . guide programming . . . [and] provide critical information to the Parole Board for release decision making . . ." *See*, New York State Board of Parole, Division of Parole Briefing Book, Legislative Hearing, 67 (February 8, 2010); *see, also*, NY Correction Law §71(a).

While [redacted] came into (DOCCS) in 1975, he reappeared before the Board after July 30, 2014, when the Board's written procedures called for it to consider the *most recent case plan*, i.e., TAP. Although Commissioner Ferguson noted [redacted] case plan ("HT" at 20,32), said plan was not the most recent. In fact, it was a duplicate equivalent of the case plan prepared for his previous Board appearance. In other words, the Board failed to consider the *most recent case plan* as required by Section 71(a) of the Correction Law. *See, e.g.*, Exhibit "D" p.1, 2013 Case Plan; compare with p.2, 2015 case plan. *See, also*, 9 NYCRR § 8002.3(12); (DOCCS) Directive 8500.

As a consequence, the Board's failure to consider the most recent case plan, violates the lawful procedure set forth in Executive Law §259(c)(12), which states:

> "To facilitate the supervision of all inmates released on community supervision the chairman of the state board of parole shall consider the implementation of a program of graduated sanctions, including but not limited to the utilization of a risk and needs assessment instrument that

> would be administered to all inmates eligible for parole release supervision."

See, e.g., Burr v. Evans, 2013 NY Misc. LEXIS 3592 ("In the absence of any indication in the record that a TAP and/or COMPAS risk and needs assessment instrument was utilized . . . the case at bar must be overturned with a *de novo* hearing ordered)."

Since the TAP is part of the COMPAS, [redacted] is entitled to a *de novo* hearing, considering that his rehabilitation and likelihood of success, were not fully measured in accordance with Correction Law §71(a). *See, Silmon v. Travis,* 95 NY2d 470, 477 (2000)("there is a strong rehabilitative component in the statute that may be given effect . . .")

POINT V

THE BOARD RENDERED A DECISION IN CONCLUSORY TERMS.

It is well settled that, when the Parole Board evaluates an inmate for discretionary release, Executive Law §259-i(2)(a)(ii) requires that, "if parole is not granted upon such review, the inmate shall be informed in writing within two weeks of such appearance of the factors and reasons for such denial of parole. Such reasons shall not be given in conclusory terms."

Additionally, 9 NYCRR §8002.3(d) provides as follows:

> "Reason for denial. If parole is not granted, the inmate shall be informed in writing, within two weeks of his interview, of factors and reasons in detail for such denial . . ."

Indeed, simply mouthing the statutory framework is illegal. [redacted] decision is based on unlawful procedure, is arbitrary and capricious, and does not provide him with a meaningful statement of why he was denied parole. Furthermore, noting an inmate's positive institutional adjustment or achievements in the written decision is not tantamount to considering them in a fair, reasoned, and individualized manner, *Chan v. Travis*, NYLJ February 27, 2003 (Sup. Ct. Albany Co. 2003).

Here, [redacted] was denied discretionary release upon the Board's findings that **1)** "there is a reasonable probability that [he] would not live and remain at liberty without again violating the law"; and **2)** his "release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law." ("HT") at p.31.

During the hearing, however, the Board noted Mr. [redacted] physical condition, sentencing minutes, risk assessment, and good disciplinary record by stating "[y]our physical health, you do have some issues, right?" . . . "[w]e have your sentencing minutes" . . . "future violence,

rearrest, and absconding. So according to COMPAS, if your released, COMPAS is indicating that you wouldn't hurt someone, wouldn't get rearrested, and wouldn't abscond. It's also indicating low in criminal involvement, low in history of violence" . . . "[y]ou have a disciplinary record that for the length of time you been in is not very long." ("HT") at 2,16,17,21,32.

These comments by Commissioner Ferguson, [redacted] contends, supports the proposition that the Board rendered a detailed decision in conclusory terms by simply mouthing the statutory framework. Indeed, there is no detail in the decision, and it reads more or less like other boilerplate parole denials. *See, Perfetto v. Evans*, 112 AD3d 640 ("the Parole Board's explanation for doing so was set forth in conclusory terms, which is contrary to law"); *Pulinario v. NYS DOCCS*, 2014 WL 886955 (Sup. Ct. NY Co. Feb. 11, 2014) (". . . the Board must do more than make a passing reference to such factors)." *Rabenbauer v. DOCCS Bd. Of Parole*, 2014 NY Slip Op. 24347 (same).

Notably, not only did the Board render a decision in conclusory terms by simply mouthing the statutory framework, but it compounded that error by **a)** focusing exclusively on the instant offense and a juvenile delinquent adjudication rendered 58 years ago; **b)** relying

on significant opposition to deny release; and **c)** failing to consider the most recent case plan.

Indeed, the Board rendered a decision in conclusory terms by simply mouthing the statutory framework. The decision should be reversed and a *de novo* hearing ordered before a different panel of Commissioners.

CONCLUSION

For all of the above stated reasons, appellant, [redacted] urges the Appeals Unit to reverse the determination dated November 10, 2015, and order a *de novo* hearing before a different panel of Commissioners.

DATED: MARCH 4, 2016

Respectfully submitted,

[redacted]

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EXHIBITS

EXHIBIT - "A": PAROLE BOARD HEARING TRANSCRIPT, DATED NOVEMBER 10, 2015.

EXHIBIT - "B": MEDICAL HISTORY DOCUMENT, DATED 12/22/2014.

EXHIBIT - "C": PAROLE BOARD REPORT SHEET, DATED OCTOBER 20, 2015.

EXHIBIT - "D": PAGE #1, 2013 CASE PLAN, DATED 6/12/2013; PAGE #2, 2015 CASE PLAN, DATED 12/10/2015.

EXHIBIT - "E": EMPLOYMENT LETTER FROM HUDSON LINK BY [redacted] DATED OCTOBER 27, 2015.